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No. 98-707

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

RONALD MOCK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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November 25, 1998

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Central of Georgia Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Ronald Mock, has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association

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[1] The letter expressing consent has been filed with the Clerk of the Court.

representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. The court below failed to give a proper tax instruction, in accordance with federal law. Because the tax instruction is crucial to the proper calculation of damages whenever lost earnings are at issue, as was the case here, this erroneous ruling directly and substantially impacted the defendant railroad's liability. Since a plaintiff's lost earnings frequently is a substantial element of damages, such a deprivation of a railroad's substantive rights under FELA is a matter of concern to AAR and its members.

When AAR appears before a court as *amicus curiae* in a FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

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[2] *E.g., CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. Co. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 380 (1996). All granting motion of AAR to participate as amicus curiae.

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 1,000 attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts have displayed a tendency to interpret FELA expansively, at times beyond what is warranted by the statute's language or intent. This problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as railroads continues to be subject to this unique compensation scheme, they will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court's ruling plainly is inconsistent with this Court's decision in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), and has the potential greatly to increase railroad liability under FELA. Moreover, if allowed to stand, it may impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to this Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produces 93 per-

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

cent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA), enacted by Congress in 1908 to provide a tort remedy for railroad employees injured on the job. FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as the federal government, to cover employees within their jurisdiction. The workers' compensation systems provide insurance type benefits, eliminating the notion that recovery for work-related injuries should be conditioned on a showing of employer negligence. Today, the railroad industry is virtually the only one in which work-related injuries are compensated under a fault-based system.[2]

FELA is a costly and litigious system. In 1997, for example, 8,086 FELA lawsuits were brought.[3] In recent years, the cost of FELA verdicts, combined with the cost of defending and settling claims, has risen to $1 billion, or more, annually, rendering FELA a significant cost component of operating a railroad.[4] By all accounts, railroads expend far more on FELA than is spent by private industry in general in payment of compensation to injured employees.[5]

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] ASSOCIATION OF AMERICAN RAILROADS, 1997 CLAIM & LITIGATION REPORT 3-3 (Aug. 1998). ("CLAIM & LITIGATION REPORT"). This report contains data on AAR member railroads' FELA experiences compiled from annual surveys.

[4] During the past five years, the total cost of FELA has averaged $1.128 billion annually. CLAIM & LITIGATION REPORT (calendar years 1993-1997).

[5] Private industry as a whole pays about $0.86 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING

The court below deprived Petitioner of an important substantive right under FELA. By instructing the jury that when calculating damages for lost earnings it should not reduce the plaintiff's award for income taxes, the court undoubtedly assured an award of damages that exceeded the actual losses suffered by the plaintiff. This ruling is contrary to the clear holding of this Court. If permitted to stand and serve as precedent, it has the potential substantially to increase the already high damages paid by railroads under FELA and therefore is of concern to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF ARGUMENT

In *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), this Court ruled that a defendant in a FELA case is entitled to present evidence of the effect of the payment of income taxes on the plaintiff's lost wages, and to have the jury instructed that any award will not be subject to income taxes. The court below ignored that holding by affirming an instruction that the jury must do nothing to take the effect of income taxes into account. This erroneous ruling deprived the defendant of an important substantive right under FELA, a deprivation that directly impacted the amount of damages for which it was liable.

OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to about $2.00 for railroads. 1994 CLAIM & LITIGATION REPORT at 2-2. *See also* TRANSPORTATION RESEARCH BOARD, COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 7 (1994) ("Clearly, the higher and more extensive benefits in FELA create higher direct costs for railroads than the same injury would incur under alternative workers' compensation approaches.").

This Court has consistently held that lower courts must follow federal law on issues relating to the calculation of damages in FELA cases, and has reversed lower court decisions that have failed to do so. This Court also has frequently emphasized that FELA must be interpreted uniformly. The decision below violates the principles of FELA interpretation enunciated by this Court and therefore warrants review and reversal.

ARGUMENT

I. THE DECISION OF THE COURT BELOW SHOULD BE REVIEWED OR SUMMARILY REVERSED BECAUSE IN FAILING TO FOLLOW THIS COURT'S *LIEPELT* DECISION IT DEPRIVED PETITIONER OF THE IMPORTANT SUBSTANTIVE RIGHT TO HAVE INCOME TAXES TAKEN INTO ACCOUNT WHEN FELA DAMAGES ARE CALCULATED

The ruling below warrants summary reversal because the Georgia Court of Appeals ignored the clear teaching of this Court in *Liepelt*, violating Petitioner's right to have federal law on the important issue of calculation of damages apply in this FELA case. *Liepelt* held that in FELA cases "[i]t follows inexorably that the wage earner's income taxes is a relevant factor in calculating the monetary loss suffered" by the plaintiff. 444 U.S. at 493-94. Nonetheless, the court below told the jury that income taxes are "irrelevant" by instructing that they "not subtract income taxes" in arriving at an award. Such a ruling transforms FELA into a compensation law that pays rail workers suffering a work-related injury more money while disabled than they would earn back on the job.

A. This Court Has Emphasized the Importance of Lower Courts Following Federal Law on the Issue of Calculating Damages Under FELA

FELA is a unique compensation law that permits railroad employees injured on the job as a result of employer negligence to collect damages for both economic and non-

economic losses suffered. In contrast to the workers' compensation systems that cover the vast majority of other American workers, there are no statutory limits on the damages that may be recovered under FELA.[6] However, it clearly is not the purpose of FELA to make injured employees more than whole if they suffer work-related injuries.[7] Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that the award must compensate only for the actual pecuniary loss suffered. *Liepelt; Michigan Central R.R. v. Vreeland*, 227 U.S. 59, 71 (1913); *Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 176 (1913) ("The damage is limited strictly to the financial loss thus sustained."); *American R.R. Co. Of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913) (same).[8]

Adhering to the principle that FELA awards must be based on the actual loss suffered, this Court ruled in *Liepelt* that a FELA defendant is entitled both to a jury instruction that any damages awarded the plaintiff are not subject to taxes, and to present evidence of the income taxes payable on the plaintiff's past and future income. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages

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[6] Workers' compensation laws generally cap weekly benefits. U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Table VI (1994).

[7] *See e.g., Sinclair v. Long Island R.R.*, 985 F.2d 74, 78 (2d Cir. 1993) (Trial court should have instructed the jury to focus on the difference between what the plaintiff could have earned with his disability and what he would have earned absent the disability.). The courts also have held that FELA recovery is limited to compensatory damages, and punitive damages are not permitted. *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971); *Wildman v. Burlington Northern R.R.*, 825 F.2d 1392 (9th Cir. 1987).

[8] *See Williams v. Missouri Pac. R.R.*, 11 F.3d 132 (10th Cir. 1993) (New trial required where the jury award for medical expenses and wage loss far exceeded the evidentiary basis for the awards.)

for past and future lost wages. As the Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493. Thus, to properly assess the measure of FELA damages, the jury must not only be made aware of the non-taxability of the FELA award, it must have the ability to make appropriate adjustments to take it into account.

Liepelt is not the only decision in which this Court has stressed the importance of lower courts applying the proper measure of damages in FELA cases. In *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), this Court held that Pennsylvania courts could not apply the Pennsylvania prejudgment interest rule in FELA cases since awards of prejudgment interest are not permitted under FELA. The Court explained that " 'the proper measure of damages [under the FELA] is inseparably connected with the right of action,' and therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.' " [citations omitted] 486 U.S. at 335. The Court held that "prejudgment interest constitutes too substantial a part of a defendant's potential liability under FELA" to permit it to be awarded as "a mere local rule of procedure." *Id.* at 336.

In *St. Louis S.W. Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), this Court again emphasized the importance of following federal law with respect to the calculation of damages. The Missouri Supreme Court had refused to require a present value instruction on the ground that such an instruction was not provided for under Missouri law. This Court held that "[n]ot only" was the matter "a federal question," it was "one to which existing law provides a clear answer," requiring that damage awards be based on present value. 470 U.S. at 411.[9] Reversal

[9] The determination that future damages under FELA must be reduced to present value had been decided within a decade of

was merited because the Missouri court's refusal to allow instruction of the jury on present value was at odds with federal law.

Like *Dickerson*, this case too presents a lower court addressing a question of federal law in a manner incompatible with the clear answer provided by this Court. The court below, as required by *Liepelt*, instructed the jury that the plaintiff's award would not be subject to taxation but, in the same breath, essentially countermanded that instruction by further instructing the jury not to make any subtraction to take the non-taxability of the award into account when reaching its verdict. This would be tantamount to advising a jury, as required by *Dickerson*, that a FELA award for future damages is received by the plaintiff in a lump sum rather than over a period of years (as plaintiff's lost wages would be received), but to then go on and instruct the jury that it must do nothing to take into this account.

As Petitioner demonstrates, with near unanimity the federal courts have required the reduction of FELA awards for lost earnings by the income taxes to be paid. Pet. Br. pp. 11-12. The odd interpretation given *Liepelt* by the court below, i.e., that the jury must be advised the award is not subject to taxes but may do nothing about it, completely undermines this Court's holding and deprives Petitioner of its rights under FELA. As would adding prejudgment interest to an award or failing to instruct on present value, prohibiting a jury from accounting for the difference between pre-tax and after tax wage loss also would, in many cases, directly and substantially impact the amount of damages for which the defendant is liable.

FELA's enactment in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916).

B. Damages Under FELA Must Be Calculated Uniformly in All Courts

Rather than leaving the matter of compensating railroad employees to the laws of individual states, by enacting FELA Congress made the deliberate choice of requiring uniformity in the treatment of railroads and their employees. *Second Employers' Liability Cases (Mondou v. New York, N.H. & H. R.R.)*, 223 U.S. 1, 51 (1912); *Liepelt*, 444 U.S. at 493, n.5. Regardless of the jurisdiction where a FELA case is heard, the same substantive law must be applied. *See Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). Failing to give proper instructions with regard to the jury's role in considering the non-taxability of a damage award violates the essential principle of uniformity.

In addition to complying with the obligation to carry out the intent of Congress, there are two important practical reasons why it is essential that courts apply FELA uniformly. First, as the result of recent mergers several Class I railroads have greatly expanded their operations, covering numerous states and multiple federal circuits.[10] If FELA is not applied uniformly, in accordance with federal dictates, in and among the state and federal courts, not only will FELA claims filed by employees of different

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[10] The Burlington Northern Santa Fe now operates in 29 states, covering seven federal circuits. The Union Pacific operates in 22 states, covering six circuits. ASSOCIATION OF AMERICAN RAILROADS, PROFILE OF U.S. RAILROADS (1997 ed.). When the Norfolk Southern and CSX take over the operations of Conrail, both those railroads, which today have extensive operations in the Southeast and Midwest, will expand into the mid-Atlantic region and New England. *See* Surface Transportation Board, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corporation*, Finance Docket No. 33388 (served July 23, 1998).

railroads be subject to different rules, claims of employees of the same railroad will be subject to different rules.

Maintaining uniformity throughout the nation also is important to discourage forum shopping. Under FELA, jurisdiction is concurrent between state and federal courts and a suit may be filed in any district where the railroad is doing business. 45 U.S.C. § 56.[11] This broad venue rule often provides a railroad employee with several options in choosing a forum, a right which frequently is exercised with the intent of securing a litigation advantage in mind. *See Mobley v. Southern Ry. Co.*, 418 A.2d 1044, 1046 (D.C. 1980) ("plaintiff's choice of forum should be given special deference in FELA cases."); *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946) (Section 56 gives employees "the right to select the court in which he considers it would be most advantageous for him to bring his action.") Strict enforcement of the requirement that lower courts interpret FELA uniformly and in accordance with federal law will lessen the incentive for plaintiff's to shop for advantageous forums.

Indeed, the issue is acutely presented here where federal courts clearly would have instructed the jury to deduct taxes on lost income, *see Harden v. United States*, 688 F.2d 1025 (5th Cir. 1982), but the state court felt free to reject this precise rule based on a misreading of *Liepelt*. This case thus provides a classic situation where uniformity is critical and this Court should intervene to ensure state court fidelity to federal law in FELA cases.

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[11] Under FELA, the plaintiff truly controls the choice of forum, as suits brought in state court may not be removed to federal court. 28 U.S.C. § 1445(a).

CONCLUSION

On the basis of the foregoing, *amicus curiae* AAR respectfully submits that the petition for writ of *certiorari* to review the judgment of the Georgia Court of Appeals should be granted or, in the alternative, that the decision below be summarily reversed.

Respectfully submitted,

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